OCT 17 1994

NO. 94-531

In the Supreme Court of the United States

OCTOBER TERM, 1994

STEVEN AUGUSTUS, ET AL.
PETITIONERS

V.

STATE OF LOUISIANA, THROUGH ITS GOVERNOR, EDWIN EDWARDS, ET AL.
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it is true that six out of seven of petitioners' questions are not appropriate for this court on application for writ of certiorari, because they were not raised in a timely fashion in the courts below, thereby defeating jurisdiction in this Court.

2. Whether it is true that four out of seven of petitioners' questions are not appropriate for this court on application for writ of certiorari, because, under this Court's Rule 10 and the case law interpreting it, those questions can be seen as being decided below not on a federal question, but on state law procedural considerations, thereby defeating jurisdiction in this Court.

3. Whether it is true that this case turned below on state law concepts of sovereign and judicial immunity, not federal questions, and thus is not eligible for review on certiorari in this court, because jurisdiction thereby has been defeated.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

CONSTITUTIONAL PROVISIONS vii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 7

ARGUMENT 10

I. SIX OUT OF SEVEN OF PETITIONERS' QUESTIONS ARE NOT APPROPRIATE FOR THIS COURT ON APPLICATION FOR WRIT OF CERTIORARI BECAUSE THEY WERE NOT RAISED IN A TIMELY FASHION IN THE COURTS BELOW 10

II. FOUR OUT OF SEVEN OF PETITIONERS' QUESTIONS ARE NOT APPROPRIATE FOR THIS COURT ON APPLICATION FOR WRIT OF CERTIORARI, BECAUSE, UNDER RULE 10 AND THE CASE LAW INTERPRETING IT, THOSE QUESTIONS

TABLE OF CONTENTS (continued)

Page

CAN BE SEEN AS BEING DECIDED BELOW NOT ON A FEDERAL QUESTION, BUT ON STATE LAW PROCEDURAL CONSIDERATIONS 15

III. THIS CASE TURNED BELOW ON STATE LAW CONCEPTS OF SOVEREIGN AND JUDICIAL IMMUNITY, NOT FEDERAL QUESTIONS, AND THUS IS NOT ELIGIBLE FOR REVIEW ON CERTIORARI IN THIS COURT 16

CONCLUSION 21

TABLE OF AUTHORITIES

CASES **Page**

Aucoin v. Dunn, 233 So.2d 530 (La. 1970) 6

Bayou Des Familles Development Corp. v. U.S. Corps of Engineers, 541 F.Supp. 1025 (E.D.La. 1982) 20

Benson & Gold Chevrolet, Inc. v. La. Motor Vehicle Commission, 403 So.2d 13 (La. 1981) 6

Big River Construction v. Univ. Club I Apartments, 598 So.2d 542 (La. App. 1 Cir. 1992) 12

Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 403 U.S. 388, 91 S.Ct. 1999 (1971) 9,20

Diaz v. Allstate Ins. Co., 433 So.2d 699 (La. 1983) 6

Dier v. Hamilton, 600 So.2d 117 (La. App. 2 Cir. 1992) 12

Ellis v. Dixon, 349 U.S. 458, 75 S.Ct. 850 (1955) 7,10

Fried v. Bailey, 52 So.2d 247 (La. 1951) 12

Great Southern Life Ins. Co. v. Lebreton, 540 So.2d 1306 (La. App. 5 Cir. 1989) 12

Krauss Co. v. Develle, 110 So.2d 104 (La. 1959) 12

TABLE OF AUTHORITIES (continued)

CASES **Page**

LaBauve v. Louisiana Wildlife & Fisheries Com'n, 444 F.Supp. 1370 (E.D.La. 1978) 20

Moresi v. Department of Wildlife & Fisheries, 567 So.2d 1081 (La. 1990) 18

Roger v. Estate of Moulton, 513 So.2d 1126, (La. 1987) 17

Schwegmann Bros. v. Calvert Distillers Corp., 184 F.2d 11 (5th Cir. 1950), rev. on other grounds 341 U.S. 384, 71 S.Ct. 745 20

Smith v. Datachem, Inc., 540 So.2d 1282 (La. App. 5 Cir. 1989) 20

State v. Cryer, 263 So.2d 895 (La. 1972) 6

State v. Griffin, 495 So.2d 1306 (La. 1986) 20

State v. Jones, 586 So.2d 521 (La. 1991) 5

State v. Stripling, 354 So.2d 1297, 1300 (La. 1978) 6

State v. Union Tank Car Co., 439 So.2d 377 (La. 1983) 20

Succession of Doll v. Doll, 593 So.2d 1239, (La. 1992) 17

TABLE OF AUTHORITIES (continued)

CASES **Page**

Tafaro's Ins. Co. v. Division of Housing Imp., 259 So.2d 57 (La. 1972) 6

Williams v. Williams, 586 So.2d 658 (La. App. 2 Cir. 1991) 12

STATUTES

La. R.S. 13:994 1

La. R.S. 13:1384 1

La. R.S. 13:996 1

La. R.S. 47:1401 15,16

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment IV vii

United States Constitution, Amendment V vii

United States Constitution, Amendment XIV vii

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV (Section 1):

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On November 28, 1990, plaintiffs filed a class action suit in the United States District Court for the Eastern District of Louisiana, Number 90-4667, entitled *Steven Augustus, et al. v. the Honorable "Buddy" Roemer, et al.*, asking that La. R.S. 13:994 (B)(1)(2)(3) & (C), the 2% bail bond fee statute relating to Jefferson Parish (County), be declared unconstitutional; that enforcement of the statute be enjoined; and that all money collected pursuant to the statute be returned. Later, other similar suits were filed challenging an older version of the statute relating to Jefferson Parish and similar statutes relating to Orleans and Terrebonne Parishes (La. R.S. 13:1384 (A), (B), and (C) and 13:996 (B)(1)(2) & (3) and (C) respectively).

The four cases were consolidated for trial on the merits[1] and preliminary injunction. After submission of documents and oral argument, the federal court on July 17, 1991 ruled that all four statutes were unconstitutional on their faces, based on the United States Constitution, and enjoined their further enforcement. However, the Court was silent on plaintiffs' request for return of the 2% fees already collected. A final judgment was entered on July 24, 1991.

No motion for reconsideration or clarification of the "return the money already collected" issue was filed, nor was a motion for new trial ever filed. An appeal to the

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[1] By agreement the constitutionality of the statutes as applied was reserved for consideration at a later date only if the statutes were found to be constitutional on their faces.

United States Fifth Circuit Court of Appeals was filed by defendants, but later voluntarily dismissed before briefing or oral argument. All four cases are carried on the docket of the Eastern District of Louisiana as "closed". Plaintiffs filed no motion for attorneys' fees for work done on the case, although the fees issue was resolved informally earlier in 1994.

The same *Augustus, et al., Sierra, et al., Johnson, et al., and Saulsberry, et al.* criminal defendants/plaintiffs from federal court, along with plaintiff bondsmen, who were not formal parties to the federal litigation, through a suit filed on January 16, 1992, then sought a declaration in the state court system that the same statutes were unconstitutional under not only the federal, but also the state constitution, and once again sought the return of the 2% fees collected prior to the declaration of unconstitutionality, along with attorneys' fees for litigating these issues in the state court system. (Documents Lodged with Clerk, Item A, hereinafter DL, A at ____(p).____)

The Governor of Louisiana and the judges of the 24th Judicial District Court, the 32nd Judicial District Court, and Orleans Parish Criminal District Court (Louisiana trial courts), and Judge Waltzer of the state Fourth Circuit Court of Appeal, (formerly a judge in Orleans Parish Criminal District Court), all made defendants to the state court proceedings, filed in the district court peremptory exceptions under Louisiana law of prescription, *res judicata*, and no right and/or cause of action (DL, B) and joined (DL, C) in additional exceptions originally filed on behalf of the judges of the 24th Judicial District Court

alone by the McGlinchey firm, (DL, D)[2]

Judge Bailes, sitting by designation of the Louisiana Supreme Court as an *ad hoc* judge of the 24th Judicial District Court, received original (DL, B and D), opposition (DL, E), and reply (DL, F and G) memoranda of counsel and a Supplemental Petition (DL, H), and conducted oral argument on the exceptions. As a result, after due consideration, Judge Bailes dismissed plaintiffs' case, primarily because plaintiffs stated no cause of action in tort or *quasi* tort; because even if they stated a cause of action in tort or *quasi* tort such an action[s] would be prescribed; because the judges have immunity from tort liability; because plaintiffs did not state a cause of action under Louisiana Civil Code Article 3494; because the plaintiffs did not state a cause of action of action under Louisiana Civil Code Article 2301 or any other *quasi* contractual theory; and because the plaintiffs, even if they did state a valid *quasi* contractual theory, are barred from using said theory on the basis of sovereign immunity since the funds at issue are state funds. See Reasons for Judgment. (DL, I)

Plaintiffs lodged a timely appeal and defendants

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[2] Undersigned counsel represents all of the defendants, including the judges of the 24th Judicial District Court, the judges of the 32nd Judicial District Court, the judges of Orleans Parish Criminal Court, and the State of Louisiana, through its governor, Edwin Edwards. However, the judges of the 24th Judicial District Court have also called upon their insurance carrier to provide additional representation, and, thus, have two sets of counsel, the firm of undersigned counsel and the McGlinchey firm. Accordingly, all defendants (represented by undersigned counsel) hereby adopt the arguments made to this Court by the McGlinchey firm in its brief in opposition to writ application as though copied herein *in extenso,* in addition to the arguments made by their own counsel herein.

answered that appeal. After briefing (DL, K, L, and M), but no oral argument, the granting of exceptions and dismissing of the case by the district court was affirmed. (DL, N) The Fifth Circuit reasoned

> (1) that judicial immunity protects the judges, because they were clearly performing functions integral to the judicial process when they set the bonds on which the fees were assessed (DL, N at 4);
>
> (2) that plaintiffs are not entitled to a mandamus or mandatory injunction because there is no statutory provision for the refund of the bail bond fees (DL, N at 4); and
>
> (3) that sovereign immunity applies because this is not a suit in contract or tort and plaintiffs did not receive the permission of the Legislature to file the suit. (DL, N at 4-5)

Plaintiffs next filed a writ application to the Louisiana Supreme Court (DL, O). Oppositions were filed by the defendants (DL, P and Q) and, in due course, the application for writ was denied by the Louisiana Supreme Court without reasons by a vote of four to three. (DL, R) Subsequent thereto plaintiffs filed the instant writ application to this Court.

However, pursuant to Rule 15.1 of this Court which admonishes counsel that they "have an obligation to the Court to point out any perceived misstatements", the following comments are made regarding the Statement of the Case provided by petitioners. Petitioners attempt,

through innuendo, in their statement of the Case, to bolster the first argument that they make, namely that the entire Louisiana judiciary is in some mysterious way unfair and tainted. Plaintiffs imply that they did not get a fair hearing of their issues without specifying exactly why, (a) because judges are elected in Louisiana, (b) because the money at issue was collected in two of the largest parishes (counties) in Louisiana, (c) because the Louisiana Court of Appeals which heard this case shares a courthouse with one of the defendant district court judiciaries, and (d) because the Louisiana Court of Appeals which heard this case issued an unpublished opinion. (Petitioners' Writ Application, pages 6-7, hereinafter PWA at ____(p.)____)

In like vein, petitioners imply fundamental unfairness, because there was no evidentiary hearing on the exceptions (PWA at 7) when under Louisiana Code of Civil procedure, Article 931,[3] no evidentiary hearing is allowed on a peremptory exception of no cause of action and petitioners did not even request an evidentiary hearing as to that exception or any other. (DL, E)

Petitioners also imply fundamentally unfair treatment at the hands of the Louisiana Supreme Court, because it granted writs in *State v. Jones,* 586 So.2d 521 (La. 1991), but not in this case. (PWA at 7) Petitioners neglect to mention, however, that the *State v. Jones* application was made in a *criminal* case. The Louisiana Supreme Court made no statement in *State v. Jones* as to whether the criminal defendant therein had a civil cause

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[3] Article 931 states in pertinent part: "No evidence may be introduced at any time to support or controvert the objection that the petition fails to state a cause of action."

of action for determination of constitutionality of the Orleans 2% statute under the Louisiana Constitution when there had already been a declaration of unconstitutionality by the federal court[4] or a civil cause of action for return of the money collected before the statute was declared unconstitutional. (DL, S)

Finally, in regard to the identification of misstatements under Rule 15.1 of this Court, respondents point out that petitioners have "sinned by omission" in regard to the strictures of Rule 14.1 (h) as to detailed identification of the places in the record below where they raised the federal questions on which they seek review on application for certiorari. Respondents can only assume that this was a purposeful omission on the part of petitioners since every time they lost in the courts below, in contravention of what is required for review in this Court under Rule 14.1 (initial and constant review by the state court system of all federal questions sought to be heard by this Court), they added another handful of new arguments. This failure to raise federal questions properly and consistently in the courts below not only made the litigation in the courts below more difficult and time consuming for defendants and the courts who were required to hear these issues, but also provides the central theme of respondents' brief in opposition: Petitioners' failure to raise federal questions prop-

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[4] A long line of civil cases mandates that the Louisiana Supreme Court not decide unnecessary constitutional issues and not take up redundant issues. *State v. Stripling*, 354 So.2d 1297, 1300 (La. 1978) and cases cited therein. See also *Diaz v. Allstate Ins. Co.*, 433 So. 2d 699 (La. 1983); *Benson & Gold Chevrolet, Inc. v. La. Motor Vehicle Commission*, 403 So.2d 13 (La. 1981); *State v. Cryer*, 263 So.2d 895 (La. 1972); *Tafaro's Ins. Co. v. Division of Housing Imp.*, 259 So.2d 57 (La. 1972) and *Aucoin v. Dunn*, 233 So.2d 530 (La. 1970).

erly below deprives this Court of jurisdiction to hear this case on application for writ of certiorari.

SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction over the issues which petitioners seek to have heard on writ of certiorari. Rule 14.1 (h) of this Court, its predecessor rule, and the case law interpreting same require that in order for this Court to hear a matter on certiorari it must present a federal question and must have been raised properly in the state courts below. The questions presented by petitioners' application for writ of certiorari do not meet this test.

Petitioners' first and second arguments were not raised until this application for writ of certiorari. Petitioners' third, fourth, fifth, and seventh arguments were not raised in a sufficient and adequate manner until either the state court of appeal or the Louisiana Supreme Court, thereby defeating their right to have them heard in this Court. Furthermore, Louisiana law also requires adequate raising in order to preserve rights. Thus, the silence of the Louisiana Supreme Court in regard to the third, fourth, fifth, and seventh arguments should be interpreted under *Ellis v. Dixon,* 349 U.S. 458, 75 S.Ct. 850 (1955) as a rejection of the arguments for failure to properly raise, making decision of them turn on state procedural law as opposed to the federal question required for review in this Court and thereby defeating jurisdiction.

Leaving aside for a moment the initial problems presented by the failure of petitioners to properly raise their arguments in the state courts below, this writ applica-

tion must also be rejected for lack of jurisdiction, because it turned below on state law questions of judicial and sovereign immunity, not federal questions. Petitioners' only escape from this quicksand is to prove that they had a valid and *appropriately raised* federal question which would have defeated the state law concepts of judicial and sovereign immunity. This they cannot do.

In regard to judicial immunity, the state courts found that petitioners had conceded its effectiveness in protecting the defendant judges except if petitioners had a valid mandamus or mandatory injunction argument. The state courts found that they did not and the reasons that petitioners present now to support the idea that they did have such arguments were not presented to the state courts in a timely fashion. Thus, without even discussing the idea that petitioners' arguments to this Court in regard to a valid mandamus or mandatory injunction cause of action are correct (which is specifically denied), it is apparent that the state courts' decisions on the judicial immunity issue, *based on the arguments in front of them at the time,* were correct and must stand undisturbed by this Court as valid actions of a state court system deciding an issue based on state law concepts.

A similar analysis holds true in regard to the state courts' decisions regarding sovereign immunity. The State of Louisiana has waived its immunity only in cases involving tort, contract, or a specific waiver of immunity by the Legislature. No one contends that there was a specific waiver by the Legislature. The arguments of the petitioners in the courts below show conclusively that they never argued anything other than state law as a basis for

a contractual cause of action, thus there can be no federal contractual cause of action to defeat the State law concept of sovereign immunity.

Petitioners' only recourse is to prove a valid cause of action for a federal tort so as to defeat the state law concept of sovereign immunity. Petitioners assert such a federal constitutional tort by analogy to *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.*, 403 U.S. 388, 91 S.Ct. 1999 (1971) in which a federal tort was found to exist based on a warrantless entry and trespass. As the state courts have already pointed out though, that is not analogous to the situation at bar. In *Bivens,* the actions of the FBI agents, on which the tort was based, were illegal at the time they were committed. Here the actions of the judges in collecting these fees were constitutional at the time they were taken and indeed the judges were entitled by a long line of both federal and state cases to presume that their actions taken pursuant to the statute were constitutional. Thus, the state courts were correct in finding that no federal constitutional tort existed so as to defeat the state law concept of sovereign immunity.

Accordingly, this case was decided appropriately by the state court below on the state law concepts of sovereign and judicial immunity, not federal questions. The petitioners' application for writ of certiorari must be denied for lack of jurisdiction.

ARGUMENT

I. SIX OUT OF SEVEN OF PETITIONERS' QUESTIONS ARE NOT APPROPRIATE FOR THIS COURT ON APPLICATION FOR WRIT OF CERTIORARI, BECAUSE THEY WERE NOT RAISED IN A TIMELY FASHION IN THE COURT BELOW.

Precedent at least forty (40) years old establishes that issues not raised below may not be heard in this Court upon application for writ of *certiorari*. *Ellis v. Dixon*, 349 U.S. 458, 460, 75 S.Ct. 850, 851 (1955) ("The question...was not raised below, and hence is not open here.") See also this Court's Rule 14.1(h) which provides in pertinent part:

> If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary therof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

Petitioners' first argument is that it was impossible

for them to get a fair, impartial hearing before the various levels of the Louisiana judiciary. (PWA at 9-11) However, when the petitioners left the federal trial court with a judgment in hand that held the underlying statutes unconstitutional, but which was silent as to the "return of the money collected" issue, they faced a choice. They could have either applied for further relief in the federal trial court to get the money returned or they could have filed a new suit in the state court system seeking the same relief. It was their choice to file in the state court system. If they thought they could not get a fair hearing from *anyone* in the Louisiana judiciary, they should not have filed there.

Alternatively, if they still wanted to take their chances with the Louisiana judiciary, they should have raised this issue all along the judicial route: in the district court, in the appellate court, and in the Louisiana Supreme Court. Their failure to raise this issue until now precludes its hearing under *Ellis, supra* and Rule 14.

Similarly, this Court lacks jurisdiction to review petitioners' second argument, that the Louisiana Supreme Court failed to recognize a Fifth Amendment cause of action for the return of property taken for public use without just compensation (PWA at 12-13), because petitioners raise it for the first time in their application to this Court for a writ of certiorari. While it is true that the petitioners have always argued that the judges took their money wrongfully, they have never before made the argument that their property was taken for public use in violation of the Fifth Amendment. That argument appears neither in their Petition (DL, A), Amended Petition (DL, H), Memorandum in Opposition to Exceptions in the trial

court (DL, E), appellate original and reply briefs (DL, J and M), or application to the Louisiana Supreme Court for a writ of certiorari (DL, O). Thus, review of the question is barred in this Court.

Petitioners' third argument, that the Louisiana Supreme Court failed to recognize a cause of action based on the right to return of funds under the Fourth Amendment, mandating a review in this Court (PWA at 13-14), is also without merit. The Louisiana Supreme Court did not address petitioners' argument in that regard for the same reason that so many of the arguments petitioners wish to make in this Court are inappropriate on application for certiorari. The argument was not appropriately dealt with by petitioners in the courts below the Louisiana Supreme Court.

While the Fourth Amendment was mentioned in passing in petitioners' Supplemental Petition (DL, H at 3) it was not briefed or argued to either the state district court or the court of appeals (DL, E. J. and M). In seeking to raise it for the second time in passing in their writ application to the Louisiana Supreme Court (DL, O at 14), petitioners ignored the basic tenet of Louisiana law that new issues may not be raised for the first time on appeal. See *Uniform Rules of Courts of Appeal*, Rule 1-3. Scope of Review; *Williams v. Williams*, 586 So.2d 658 (La. App. 2 Cir. 1991); Big River Construction v. Univ. Club I Apartments, 598 So.2d 542 (La. App. 1 Cir. 1992); *Krauss Co. v. Develle*, 110 So.2d 104 (La. 1959); *Fried v. Bailey*, 52 So.2d 247 (La. 1951); *Dier v. Hamilton*, 600 So.2d 117 (La. App. 2 Cir. 1992) (Statute not raised below could not be raised for first time on appeal.); and *Great Southern Life Ins. Co.*

v. Lebreton, 540 So.2d 1306 (La. App. 5 Cir. 1989).

Note especially *Williams, supra*, wherein the Court held that despite defendant raising the issue in his answer, lack of presentation of the whole issue to Court at trial and the Court's resultant ruling on a narrower version of the issue mandated limiting the appeal to a narrow version of the issue and barring on appeal the more general version of the issue. Accordingly, petitioners waived in the Louisiana Supreme Court any claim that may have been stated regarding the Fourth Amendment in their Supplemental Petition by failing to brief and argue this issue to the district and appellate courts when the defendants' exceptions were filed, heard, and reviewed, resulting in lack of jurisdiction in this Court.

Petitioners' fourth argument, that the state courts denied due process under the Fourteenth Amendment to non-convicted arrestees (PWA at 15-16), was not raised properly below either, and, thus, may not be heard in this Court. While the text of the applicable statute (Old Jefferson) was quoted in the original Petition (DL, A at 5, n.2) and the old Jefferson statute is mentioned in petitioners' memorandum in opposition to exceptions (DL, E at 1, n.2 and 16), there is absolutely no mention in the trial court of the argument that the state court system's failure to apply the provisions of the old Jefferson law regarding non-convicted arrestees constituted arbitrary and capricious action under the Fourteenth Amendment.

Similarly, while the allegation is made in petitioners' original and reply briefs to the state appellate court (DL, J at 5 and M at 3) that the money should be paid back to the non-convicted arrestees under the provisions of the old Jef-

ferson law, there is absolutely no reference to "arbitrary and capricious", "due process", and/or the "Fourteenth Amendment" in petitioners' briefs to the state appellate court. Thus, under *Williams, supra*, it was inappropriate for the Louisiana Supreme Court to consider this issue, thereby precluding any consideration here.

Petitioners' fifth argument, that the Louisiana Supreme Court did not recognize its Fourteenth Amendment equal protection argument mandating a review of that argument in this Court (PWA at 16-17), falls under the same logic. The equal protection issue was not briefed or argued to either the state district court or the court of appeals and this was pointed out by the defendants in their brief to the Louisiana Supreme Court. (DL, Q at 3-5) In the lower Louisiana courts, petitioners filed five substantive documents: a petition, a memorandum in opposition to defendants' exceptions, a supplemental petition, an original brief, and a reply brief. While the term *14th Amendment* was used in petitioners' original petition at page 24 and in the supplemental petition at page 3 and reference was made to the Equal Protection clause of the *Louisiana* Constitution (although not the U.S. Constitution) at page 25 of the original petition, petitioners made no argument in regard to a valid equal protection claim defeating defendants' exceptions when they filed their memorandum in opposition to the exceptions (DL, E).

Similarly, petitioners made no argument to the Court of Appeals in either their original or supplemental briefs on the topic of equal protection (DL, J and M). Accordingly, petitioners waived in the Louisiana Supreme Court any claim that may have been stated regarding equal

protection in their petitions by failing to brief this issue to the district court and the state appellate court. Thus, they were barred from raising equal protection for the first time on writ application to the Louisiana Supreme Court and that Court was barred from hearing it, making it less than surprising that it did not rule on the argument and making it ineligible for argument in this Court.

Petitioners' seventh argument, that the Louisiana Supreme court failed to recognize that they had a cause of action as to the unconstitutionality of La. R.S. 47:1401 *et. seq.* under the due process clause (PWA at 18-27), fails for the same reason. The unconstitutionality of La. R.S. 47:1401 et seq. was never raised until petitioners' application for writs to the Louisiana Supreme Court (DL, O), and, thus, was not appropriately heard by that court and is not appropriately heard by this Court for the reasons discussed above. The failure to raise was originally argued to the Louisiana Supreme Court by the McGlinchey brief (DL, P at 9), which was adopted by all defendants. (DL, Q at ii).

II. FOUR OUT OF SEVEN OF PETITIONERS' QUESTIONS ARE NOT APPROPRIATE FOR THIS COURT ON APPLICATION FOR WRIT OF CERTIORARI, BECAUSE, UNDER RULE 10 AND THE CASE LAW INTERPRETING IT, THOSE QUESTIONS CAN BE SEEN AS BEING DECIDED BELOW NOT ON A FEDERAL QUESTION, BUT ON STATE LAW PROCEDURAL CONSIDERATIONS.

As this Court is well aware, Rule 10 of this Court (formerly Rule 17) requires that matters coming to this Court from a State's highest court on application for a writ of certiorari turn on a question of federal law. Decisions of the state court system that rest on state law as opposed to

federal law may not be disturbed by this Court since it lacks jurisdiction to review them. *Ellis, supra*, 349 U.S. 463-464, 75 S.Ct. at 854. Thus, four out of petitioners' seven arguments are disqualified for hearing on certiorari in this Court for lack of a federal question because they can be deemed to have been disqualified for hearing in the Louisiana Supreme Court by the Louisiana procedural rules cited in Section I. above, not by any adverse federal question decision.

> The four arguments so disqualified are petitioners':
>
> third argument, that the Louisiana Supreme Court failed to recognize a cause of action based on the right to return of funds under the Fourth Amendment;
> fourth argument, that the state courts denied due process under the Fourteenth Amendment to non-convicted arrestees;
> fifth argument, that the Louisiana Supreme Court did not recognize its Fourteenth Amendment equal protection argument; and
> seventh argument, that the Louisiana Supreme Court failed to recognize that they had a cause of action as to the unconstitutionality of La. R.S. 47:1401 *et seq.* under the due process clause.

III. THIS CASE TURNED BELOW ON STATE LAW CONCEPTS OF SOVEREIGN AND JUDICIAL IMMUNITY, NOT FEDERAL QUESTIONS, AND THUS IS NOT ELIGIBLE FOR REVIEW ON CERTIORARI IN THIS COURT.

This case comes to this Court on denial of a writ of certiorari from the Louisiana Supreme Court to the Louisiana Fifth Circuit Court of Appeals. The Louisiana Supreme Court denied writs without reasons. Thus, one must assume that the majority of the Louisiana Supreme Court felt that it was improvident to grant the application for writ for the procedural reasons cited above (failure to raise questions properly below) and/or considered the reasoning of the courts below to be correct.

Since both the Louisiana district court and the Louisiana appellate court based their dismissal and affirmance of dismissal respectively on the state law concepts of sovereign immunity and judicial immunity[5], the case did not turn on a federal question which can be reviewed in this court. The only exception to this rule would be if a federal cause of action existed *and was properly asserted* which would have defeated sovereign and/or judicial immunity. We examine each concept in turn.

The Fifth Circuit, which issued the last written

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[5]Even if these concepts of sovereign and judicial immunity were incorrect, under Louisiana law, a judgment may be justified by any reason that was argued to the court issuing the judgment. La. Code of Civil Procedure, Article 2133 (B); *Roger v. Estate of Moulton*, 513 So.2d 1126, 1135-37 (La. 1987) (on rehearing); and *Succession of Doll v. Doll*, 593 So.2d 1239, 1243-44 (La. 1992) Thus, all the alternative concepts supporting the dismissal which were argued by the defendants to the Louisiana courts, including but not limited to *res judicata*, prescription, and no right/no cause of action support the judgments of the Louisiana courts. However, because they were not relied on exclusively by the Louisiana lower courts, who chose instead to focus on judicial and sovereign immunity, respondents do not discuss them here. The right to argue them as additional support for the actions of the Louisiana courts is reserved in the event that this Court decides that it is appropriate to grant a writ of certiorari (which is specifically denied).

reasons in this case, based its judicial immunity finding on the state law case of *Moresi v. Department of Wildlife & Fisheries,* 567 So.2d 1081 (La. 1990). As petitioners had conceded that they were not eligible for damages, because of judicial immunity (DL, J at 6-7), their only recourse was to argue that a mandamus action or mandatory injunction supported return of the money. The Fifth Circuit found, however, that there was no statutory authorization to support such a mandatory action. While petitioners now argue a variety of items as support for such a mandatory action so as to defeat judicial immunity, as discussed above in Section I. and II., those arguments were not made to the Fifth Circuit, and, thus, did not have to be considered by the Fifth Circuit, even if they are correct (which is specifically denied).

Thus, as the case was heard by the Fifth Circuit and reviewed on application for certiorari to the Louisiana Supreme Court, there was no statutory authorization for the return of the money so as to provide the basis for a mandamus or mandatory injunction which would defeat judicial immunity. Accordingly, the Fifth Circuit's decision that the state law concept of judicial immunity was applicable and the Louisiana Supreme Court's refusal to grant writs as to that decision must stand undisturbed by this Court as valid interpretations of Louisiana law which do not provide the federal question jurisdiction necessary in this Court for a writ of certiorari.

Similarly, the Fifth Circuit based its decision on sovereign immunity on the state law provision regarding same found in the Louisiana Constitution of 1974 which provides in Article XII, Section 10 in pertinent part as

follows:

> (A) No immunity in Contract and Tort.
> Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.
>
> (B) Waiver in Other Suits.
> The legislature may authorize other suits against the state, a state agency, or a political subdivision. A measure authorizing suit shall waive immunity from suit and liablility.

Petitioners have never asserted that they had the permission of the Louisiana Legislature to file this suit. Thus, in order to escape sovereign immunity they had to prove that they had a valid claim in contract or tort.

The various memoranda and briefs of the petitioners (DL, E at 3, 16; J at 3, 5-6, 8-9; M at ii, 1-4,6; and O at 8, 10-11, 14-17) make it clear that they have never urged that they had a contractual cause of action based on anything other than state law. Federal law as a basis for a contract was never discussed. Thus, petitioners' only recourse in this Court is to show that they have some valid grounds to prove a federal tort. Otherwise, they cannot defeat the state trial court's and state Fifth Circuit's decisions, bolstered by the Louisiana Supreme Court's denial of writs, that there was no valid cause of action in tort so as to defeat sovereign immunity.

Petitioners assert that they have such a cause of action for a federal constitutional tort by analogizing to the

case of *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.*, 403 U.S. 388, 91 S.Ct. 1999 (1971). However, citation of this case raises the issue pointed out by the state trial court when it commented that "[p]laintiffs have cited no case to this court which holds that the collection of a fee authorized by a statute, subsequently declared unconstitutional, is a tort against the person who paid the fee." (DL, I at 2) In *Bivens*, the underlying complained of action, warrantless entry and trespass respectively, was unlawful *at the time the action was taken.*

This is a radically different concept than the one that plaintiffs urge here wherein they ask this Court to hold that an action, lawful at the time taken, should retroactively be considered a tort, because of a subsequent declaration of unconstitutionality. In the situation currently at bar, the various judges were having a fee collected under a statute presumed not only by themselves, but also by both federal and state law to be constitutional until otherwise proven. *Schwegmann Bros. v. Calvert Distillers Corp.*, 184 F.2d 11 (5th Cir. 1950), rev. on other grounds 341 U.S. 384, 71 S.Ct. 745 (One who asserts rights under a state statute need not prove as a condition precedent to its enforcement that legislature had right to enact it and he may stand on presumption of validity until such presumption is overthrown.); *Bayou Des Familles Development Corp. v. U.S. Corps of Engineers*, 541 F.Supp. 1025 (E.D.La. 1982); *LaBauve v. Louisiana Wildlife & Fisheries Com'n*, 444 F.Supp. 1370 (E.D.La. 1978); *State v. Griffin*, 495 So.2d 1306 (La. 1986); *State v. Union Tank Car Co.*, 439 So.2d 377 (La. 1983); *Smith v. Datachem, Inc.*, 540 So.2d 1282 (La. App. 5 Cir. 1989).

Accordingly, *Bivens* does not support the proposition that the judges committed a tort by proceeding with collection under the statute until it was declared unconstitutional and petitioners have not stated a cause of action for a federal constitutional tort so as to defeat the finding of the state court system that sovereign immunity governs this situation.

CONCLUSION

For the reasons stated above, petitioners' application for a writ of certiorari should be denied.

Respectfully submitted,

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